



United States Government
NATIONAL LABOR RELATIONS BOARD
Region 2
26 Federal Plaza – Room 3614
New York, New York 10278-0104

Telephone: (212) 264-0300
Facsimile: (212) 264-2450

October 29, 2007

National Labor Relations Board
Office of the Executive Secretary
Attn: Lester A. Heltzer,
Executive Secretary
1099 14th Street, N.W.
Washington, DC 20570

Re: The Lorge School
Case No. 2-CA-37967

Dear Mr. Heltzer:

Pursuant to Section 102.46 of the Board's Rules and Regulations, enclosed please find the original and seven copies of General Counsel's Brief in Answer to Respondent's Exceptions to the decision of the Administrative Law Judge, which was e-filed on October 29, 2007.

Very truly yours,

Lindsay R. Parker
Counsel for the General Counsel

cc:

Linda Cooperman
3 Patterson Road
Pound Ridge, NY 10576-1521

The Lorge School
Attn: Martha D. Bernard,
Chair, Bd. of Trustees
353 West 17th Street
New York, NY 10011

Daniel A. Silverman, Esq.
Silverman & Silverman LLP
52 Third Street
Brooklyn, NY 11231

United Federation of Teachers, Local 2,
American Federation of Teachers, AFL-CIO
Attn: Antonio M. Cavallaro
Associate Counsel
52 Broadway, 9th Floor
New York, NY 10004

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 2

THE LORGE SCHOOL,
Respondent

and

Case No. 2-CA-37967

LINDA COOPERMAN,
Charging Party

**COUNSEL FOR THE GENERAL COUNSEL'S
BRIEF IN ANSWER TO RESPONDENT'S EXCEPTIONS**

Lindsay R. Parker
Counsel for the General Counsel
National Labor Relations Board
Region 2
26 Federal Plaza, Room 3614
New York, NY 10278

Dated at New York, New York
October 29, 2007

TABLE OF CONTENTS

TABLE OF CONTENTS.....	i
TABLE OF AUTHORITIES.....	iii
I. STATEMENT OF THE CASE.....	1
II. ISSUE PRESENTED.....	2
III. STATEMENT OF FACTS.....	2
Respondent, the Union, and key personnel.....	2
Respondent's relationship with the Union and Union Representatives.....	3
In late spring of 2006, the State Education Department issued a highly-critical report about the School's educational program and Respondent's Executive Director and Instructional Supervisor retired.....	5
Respondent interviewed and hired Linda Cooperman to be the new Instructional Supervisor at the School.....	6
Kasner complained to Cooperman about the Union activities of the Union Representatives.....	8
Kasner told Cooperman to create a hostile work environment for the Union representatives.....	10
Kasner criticized Cooperman's cooperative approach toward Rouse and Piccigallo.....	10
Cooperman proposed departmentalization of classes for middle and upper-level students to bring the school into compliance with State mandates.....	11
At a Leadership Team meeting on July, 28, Respondent insisted that Rouse and Piccigallo had to be discharged.....	13
On July 31, 2006, Kasner rejected Cooperman's departmentalization plan.....	16
Respondent discharged Linda Cooperman on August 1, 2006, after her second Leadership Team meeting.....	17
A School Custodian overheard Kasner and Bernard admitting that Cooperman had been fired for not discharging Piccigallo and Rouse.....	19
Respondent continued to display of hostility toward the Union and its representatives after firing Cooperman.....	19

<i>Osman threw a contract at the Union delegate during a grievance meeting.....</i>	19
<i>Kasner threatened to discharge a temporary employee and increase Rouse and Piccigallo's duties if they pursued a grievance on behalf of the employee.....</i>	21
<i>Current Instructional Supervisor Barry Malloy told Rouse that unfair harassment against him will continue regardless of his job performance.....</i>	22
IV. ARGUMENT.....	24
<i>Respondent's credibility arguments should be dismissed.....</i>	24
<i>The ALJ applied the appropriate legal standard to Cooperman's discharge.....</i>	26
<i>The ALJ was correct in his admission of and reliance on audio recordings.....</i>	33
<i>The ALJ was correct in concluding that it was Rouse and Piccigallo's protected activity that prompted Kasner to solicit Cooperman to commit unfair labor practices against them.....</i>	34
V. CONCLUSION AND REMEDY.....	37

TABLE OF AUTHORITIES

<i>Abbey's Transportation Services</i> , 284 NLRB 698 (1987), <i>enf'd</i> , 837 F.2d 575 (2 nd Cir. 1988).....	27
<i>American Cyanamid Co.</i> , 301 NLRB 253 (1991).....	27
<i>American Gardens Management Co.</i> , 338 NLRB 644 (2002).....	27
<i>Carpenter Sprinkler Corp.</i> , 238 NLRB 974 (1978).....	34
<i>Casa San Miguel, Inc.</i> , 320 NLRB 534 (1995).....	31
<i>Centre Property Management</i> , 277 NLRB 1376 (1985).....	31
<i>Detroit Newspaper Agency v. NLRB</i> , 435 F.3d 302 (D.C. Cir. 2006).....	31
<i>Dlubak</i> , 307 NLRB 1138 (1992), <i>enf'd</i> , 5 F.3d 1488 (3rd Cir. 1993).....	27
<i>East Belden Corp.</i> , 239 NLRB 776, 782 (1978) <i>enf'd</i> . 634 F.2d 635 (9 th Cir. 1980).....	33
<i>General Films</i> , 307 NLRB 465 (1992).....	27
<i>Hospital San Pablo</i> , 327 NLRB 300 (1998), <i>enf'd</i> . 207 F.3d 67 (1st Cir. 2000).....	35
<i>International Longshoremen Assoc. v. Davis</i> , 476 US 380 (1986).....	26
<i>Monroe Mfg.</i> , 323 NLRB 24 (1997).....	33
<i>Montgomery Ward & Co.</i> , 316 NLRB 1248 (1995), <i>enf'd</i> , 97 F.3d 1448 (4 th Cir. 1996).....	35
<i>Orange County Publications</i> , 334 NLRB 350 (2001).....	33
<i>Parker-Robb Chevrolet, Inc.</i> , 262 NLRB 402 (1982), <i>enf'd sub nom.</i> , <i>Automobile Salesmen's Union Local 1095 v. NLRB</i> , 711 F.2d 383 (D.C. Cir. 1983).....	26
<i>Pioneer Hotel, Inc.</i> , 324 NLRB 918 (1997).....	25-26, 30-31
<i>Postal Service</i> , 256 NLRB 736 (1981).....	30
<i>Professional Medical Transport, Inc.</i> , 346 NLRB No. 108 (2006).....	26-27
<i>Triple A Fire Protection</i> , 315 NLRB 409 (1994).....	33- 34
<i>Trus Joist MacMillan</i> , 341 NLRB 369 (2004).....	26
<i>USF Red Star, Inc.</i> , 330 NLRB 53 (1999).....	26
<i>Waltz Mansonry</i> , 323 NLRB 1258 (1997).....	33
<i>Wellstream Corp.</i> , 313 NLRB 699, 711 (1994).....	33
<i>Wright Line</i> , 251 NLRB 1083 (1980), <i>enf'd</i> ., 662 F.2d 899 (1 st Cir. 1981)....	26-27, 31-32

I. STATEMENT OF THE CASE

On November 8, 2006, Linda Cooperman (herein Cooperman) filed Case No. 2-CA-37967 against The Lorge School (herein Respondent, or the School). The charge, which was amended on December 19, 2006, alleges that Respondent discharged Cooperman in retaliation for her refusal to discharge or discipline employees on the basis of those employees' union activities and activism, in violation of Section 8(a)(1) of the National Labor Relations Act (G.C. Ex. 1(c)). The Complaint likewise alleges that Respondent violated Section 8(a)(1) by discharging Cooperman because she refused to commit unfair labor practices (G.C. Ex. 1 (e)). Respondent filed an Answer denying the alleged violation (G.C. Ex. 1(i)).

After a hearing held on May 30, 31, June 1, and June 13, 2007, Administrative Law Judge Raymond P. Green issued his decision on August 3, 2007, finding that Respondent violated Sections 8(a)(1) of the Act by discharging Cooperman because of her refusal to assist in causing the resignation or constructive discharges of Chris Piccigallo and James Rouse because of their activities as union representatives. On September 17, 2007 Respondent filed exceptions to the decision and a supporting brief.

Pursuant to Section 102.46 of the Rules and Regulations of the National Labor Relations Board, herein the Board, Counsel for the General Counsel, herein General Counsel, hereby files a Brief in Answer to Respondent's Exceptions to the Administrative Law Judge's Decision. General Counsel submits that the exceptions filed by Respondent are without basis in the record or law and should be dismissed in their entirety.

II. ISSUE PRESENTED

Whether Respondent violated Sections 8(a)(1) of the Act by discharging Linda Cooperman.

III. STATEMENT OF FACTS

Respondent, the Union, and key personnel.

Respondent operates a publicly funded private school for learning- and emotionally-disabled students in grades kindergarten through 12 in a five-floor building in Manhattan (ALJD p. 2, Tr. 22, 24, 110, 113-114, 153)¹. There are between 70-90 students in the school and approximately 8-10 students in each classroom. Students are grouped by age into eleven primary classrooms, each with a teacher and teaching assistant (ALJD p. 2, Tr. 23, 153).

Reporting to the Board of Trustees, Deborah Kasner has been Respondent's Executive Director, with overall responsibility for Respondent's labor relations, since mid-June, 2006 (ALJD p. 2, Tr. 21, 28). Kasner had been working at Lorge since 1996 as a Social Worker and then as Clinical Supervisor (Tr. 26, 20-21). Since the end of June, 2006, Clinical Supervisor David Osman has been the Contract Administrator for Respondent, handling the initial stage of grievance processing in addition to supervising the school's four social workers (ALJD p. 2, Tr. 28-29, 498).

The United Federation of Teachers (herein, the Union) has represented Respondent's teachers and other non-administrative personnel since 2000 (Tr. 27, 269, G.C. Ex. 3). The

¹ Abbreviations are used to refer to record evidence as follows: ALJD = Administrative Law Judge's decision, Tr. = Transcript of Hearing, Jt. Ex. = Joint Exhibit, G.C. Ex. = General Counsel's Exhibit, R. Ex. = Respondent's Exhibit.

current collective- bargaining agreement was signed in April of 2006, and is effective through June 30, 2008 (ALJD p. 3, Tr. 27, G.C. Ex. 3).

Since 2002, classroom teacher Christopher Piccigallo has been the Union's Chapter Leader at the school and music teacher James Rouse has been the Union Delegate (ALJD p. 3, Tr. 266, 429, 715). Piccigallo and Rouse together handle grievances at Step One and Two (ALJD p. 3, Tr. 267-69). Among other duties, Piccigallo participates in contract negotiations and Rouse orients new members, distributing copies of the Union contract and dues-authorization check-off cards (Tr. 267, 430). Rouse and Piccigallo attend bi-monthly Union-management meetings with Kasner, Osman, Assistant Dean Pierre, and a few other staff members (Tr. 267-68).

Rouse has worked for Respondent for more than ten years, is the highest-paid teacher, and has received uniformly positive appraisals (Tr. 125-26, 265). Piccigallo has also received only positive appraisals in his six years at the school (Tr. 126-27).

Respondent's relationship with the Union and Union Representatives.

Christopher Piccigallo and James Rouse have been active on behalf of the Union at the school since the organizing campaign began. They marched in demonstrations in front of the school with the inflated rat, talked with fellow employees about the Union, and handed out leaflets (Tr. 270, 429-30, 269-70, 458). Piccigallo participated in negotiations for both contracts (Tr. 430).

Conflict with management was apparent from the Union's earliest days at the school. During the term of the first Union contract, Deborah Kasner, then Clinical Supervisor, served as Contract Administrator for the School under then-Executive Director Michael Pagliuca (Tr. 28,

142, 430). Kasner complained often during this period about the Union being adversarial during grievance hearings (Tr. 430).

Although the ALJ did not rely on this information, it is important to note that in June of 2003, Rouse asked the then-Dean of Students Maggie Bacon why a friend whom he had recommended for a job was not being hired by the school (Tr. 270-71). Bacon told him, "I am not hiring your friend because of you and your union crap. One thing goes wrong between myself and your friend, you're going to be up in my face because of your union crap defending his rights" (Tr. 271). The friend was eventually hired after Rouse complained to Pagliuca (Tr. 272).

In June 2006, shortly before he retired, Pagliuca wrote up then-custodian Edwin Blowe for a failure to maintain hallway lights. At the time, Blowe had had a recent personal disagreement with Piccigallo (Tr. 672, 674, 679). When Pagliuca gave Blowe his write-up and asked whether he wanted a Union representative, Blowe replied that he did not "deal with the Union." Pagliuca then asked Blowe, "why don't you try to get rid of the union if you don't need them?" (Tr. 672-74). He told Blowe that the school wanted the union out of the building, and that he only needed a certain number of votes to get the union out (Tr. 671, 674, 678). Later, he called Blowe in to meet with himself and Martha Bernard (Tr. 670, 674, 679). He told Blowe that he needed 30% of the votes to get the union out of the building and Blowe said, "okay" (Tr. 671, 674-75, 678-79). Bernard and Pagliuca met with Blowe subsequently and Bernard asked Blowe whether he had started "getting the votes" (Tr. 675). Blowe said he had not, and did not speak with them again about the matter (Tr. 675).

For years, Rouse has helped bargaining unit personnel with obtaining certification with the New York State Education Department, pursuant to Article 7 of the collective-bargaining

agreement (Tr. 267, 274, G.C. Ex. 3, p. 7).² In mid-July, 2006, in part prompted by a State review of the school described below, Rouse asked Kasner for contact information for new bargaining-unit employees so that he could provide them with certification-related information (ALJD p. 3, Tr. 287-88, 364-65, 432). Kasner told Rouse she felt uncomfortable giving him the information. When he followed up a week or two later, telling her he was entitled to the contact information under the NLRA, she said she had to talk to her people about it (Tr. 289). The information was at last provided only after Chapter Leader Piccigallo sent a July 27, 2006, letter to Kasner formally requesting it (ALJD p. 3, Tr. 289, 366, 432-33, G.C. Ex. 11).

In late spring of 2006, the State Education Department issued a highly-critical report about the School's educational program and Respondent's Executive Director and Instructional Supervisor retired.

In the late spring of 2006, Respondent's Executive Director Michael Pagliuca resigned, and Instructional Supervisor Dr. Elaine Dawes retired (ALJD p. 2, Tr. 37, 38, 410). During this period, the New York State Education Department drafted and issued a, "Special Education Quality Assurance Focused Review" of Respondent, herein referred to as the "State Report" (ALJD p. 2, Tr. 35-36, 128-29, 608, G.C. Ex. 4).

The State Report identified numerous serious deficiencies at the school. Respondent's administrators, including Kasner, were cited for lack of proper certification. The State limited uncertified administrators to spending no more than 25% of their time in a supervisory capacity (Tr. 36, 115, G.C. Ex. 4 p. 1 of portrait and landscape charts). Regarding the educational program, the State Report recommended that the school initiate a diploma program to replace their G.E.D.-focused program (Tr. 37, 43-44; G.C. Ex. 4, p. 16 landscape). Among the lower-level classes, the Report found a failure to teach according to State standards (Tr. 44; G.C. Ex. 4,

² Article 7 of the contract, which appeared also in the parties' prior contract, mandates that teachers must be certified in accordance with the New York State Education Department requirements (G.C. Ex. 3, p. 7).

p. 13 landscape). It noted as well that all teachers should have a copy of each student's Individual Education Plan (IEP) (Tr. 131-132, G.C. Ex. 4, p. 2 portrait).

Respondent interviewed and hired Linda Cooperman to be the new Instructional Supervisor at the School.

In May, 2006, Cooperman interviewed twice with members of Respondent's Board of Trustees for the position of Executive Director (Tr. 154, 157). In the first interview, she fielded questions about her background and shared some negative impressions she had of the school from a recent tour. The trustees told her they wanted to make improvements (Tr. 155, 215, 576). During this meeting, Board Chair Martha Bernard said that there had been problems with the Union at the school and asked Cooperman specifically about her experience with unions (Tr. 155). Cooperman explained that as a teacher she had been a union member and a delegate in the school where she taught, and as a school administrator she had dealt with union issues from the management perspective (Tr. 155). She noted that she had never had any grievances brought against her, and that grievances she handled had always been resolved at the first step (Tr. 155).

After her second interview, Board Member Howard Johnson notified Cooperman that another candidate had been selected. Shortly thereafter, he emailed her to ask whether she would be interested in the Instructional Supervisor position and she responded that she would (Tr. 157). Johnson forwarded Cooperman's resume to Kasner, and in early June, 2006, Kasner interviewed Cooperman (Tr. 26, 158). Kasner asked Cooperman whether she would have a problem reporting to Kasner, having been herself rejected for the Executive Director position (Tr. 158). Cooperman told her that she thought not, that she looked forward to the chance to play a leadership role in the school as Instructional Supervisor (Tr. 158). Kasner admitted to Cooperman that she was not licensed as a school administrator, and asked whether it would be a

problem for Cooperman to work with someone who was not an educator (Tr. 158, 214).³

Cooperman replied that she would be happy to work with Kasner as a partner (Tr. 158).

During the interview Kasner and Cooperman discussed Cooperman's experience dealing with children with learning disabilities. They also talked about Cooperman's experience with schools undergoing change, given that Kasner was new to the Instructional Supervisor position and Cooperman was replacing an Instructional Supervisor who had been at the school for five years (Tr. 29-30, 38). Kasner felt that Cooperman had interesting ideas about developing the school's academic programs (Tr. 30). Kasner determined that Cooperman had good experience that would prepare her to supervise staff appropriately and provide instructional leadership in accord with the State Report mandates, and decided to hire her (ALJD p. 2, Tr. 35-36, 131).

Cooperman began as Instructional Supervisor at the school on July 10, 2006, during the summer session (Tr. 29, 59, 152-3). She was responsible for supervising and evaluating the teaching staff, and for maintaining an instructional program that met State standards (Tr. 153, 114-115).⁴ She reported directly to Kasner and was a member of the school's leadership team along with Kasner, Osman, Bradley, and Pierre (Tr. 154). At Kasner's request, the school's prior Instructional Supervisor, Dr. Elaine Dawes, stayed on at the School for the first two weeks of Cooperman's tenure, to help orient her (Tr. 37, 413). Cooperman spent her entire first week with Dawes, learning about the school and Dawes's efforts there (Tr. 159, 217, 413).

That first week Cooperman spoke with Dawes about the Report (Tr. 162). Dawes told her that with respect to State standards, students were being prepared for a GED and community internship experiences because the school administration had determined that they were incapable of meeting the State standards (Tr. 161-62). With respect to the Report's limitations

³ Kasner has no certifications with regard to supervision of educational personnel (Tr. 108). Her background is in social work and not education; she has never taught (Tr. 39, 106-07).

⁴ Kasner acknowledged that the Instructional Supervisor position requires a school administrator's license (Tr. 115).

on administrative duties performed by non-certified individuals, Dawes told Cooperman, “the school is yours,” because Cooperman would be the only administrator with proper State certification (Tr. 36, 216, 413, 415). She also told Cooperman that her status as sole certified administrator would task her with supervising the Dean and Assistant Dean in addition to supervising the teaching staff, though Kasner later contradicted that (Tr. 216-17, 163-64, 242).

Kasner complained to Cooperman about the Union activities of the Union Representatives.

On Cooperman’s second or third day, she asked Kasner for her impressions of the teachers (Tr. 165, 591). As they began to review the list, Kasner received a telephone call from Bernard (Tr. 165, 170-71). She told Cooperman that Bernard had been calling about two grievances she was facing from the Union (ALJD p. 2, Tr. 165, 243). The first grievance involved custodian Blowe’s two-day suspension for the hallway light; Kasner told Cooperman that the Union was objecting to the suspension and asking for backpay (Tr. 165-66, 243). Kasner told Cooperman she thought the grievance had merit but that she did not like the Union’s approach to her about the issue (Tr. 166).⁵ The second grievance involved a letter in the file of a janitor thought to be selling bootleg videos in the school’s basement (Tr. 167-68, 243-44).

Kasner told Cooperman that the prior administration had been “very soft” on teachers and allowed the teachers to control the school (ALJD p. 3, Tr. 166). She said they had made decisions about the school with an eye to avoiding grievances but that she would “show them who’s boss.” (ALJD p. 3, Tr. 166). Cooperman suggested that the disputes could be resolved (Tr. 172). The two then briefly discussed some of the teachers at the school and adjourned to resume in the afternoon (Tr. 169, 173).

⁵ This grievance was resolved by settlement dated August 6, 2006, with Blowe receiving pay for one of the two days (Tr. 520-22, R. Ex. 6).

During the afternoon, Kasner and Cooperman were interrupted by another phone call, this time from Teaching Assistant Conchetta Diaz (Tr. 174, 228). When the call ended, Kasner told Cooperman that Diaz had been crying because James Rouse had told her she would be fired by the end of the year if she did not get her teaching certification (ALJD p. 3, Tr. 176, 228). Kasner angrily complained that James Rouse had upset Diaz – she said Rouse was acting beyond the bounds of his job, and wanted to be an administrator (ALJD p. 4, Tr. 174).⁶ Kasner told Cooperman that Rouse had applied for both the Executive Director and Instructional Supervisor positions (Tr. 168, 175). Kasner then complained that Rouse had tried to distribute a letter to staff about how they could find information on the internet about certification (Tr. 175-76, 276-77, G.C. Ex. 9). Kasner told Cooperman that informing the staff about that was an administrative task and not Rouse’s job (Tr. 168, 175). She told Cooperman to “watch out” for Rouse, not to trust him, and not to let him control her (ALJD p. 4, Tr. 168, 175). She said that Rouse wanted their jobs and had created a lot of trouble for the school (ALJD p. 4, Tr. 175).⁷

When Kasner and Cooperman reached Christopher Piccigallo’s name on the list of teachers, Kasner told Cooperman he was an average teacher. She opined that Piccigallo was “fulfilling administrative ambition” by being a Union leader (ALJD p. 4, Tr. 177).⁸

⁶ Rouse testified that in July, 2006, Piccigallo had asked him to check on Diaz’s certification because Kasner had asked about it (Tr. 284-85, 433). When he learned from Diaz that she had not progressed toward certification, he told her it was a job requirement under the Union contract, and that she and any staff member could be fired without it (Tr. 284). Rouse reported the conversation to Kasner, noting that he would help Diaz with the certification process (Tr. 286). Diaz had not cried during her conversation with Rouse, but Kasner told him that Diaz was upset about it and very scared of being fired (Tr. 286, 340-41).

⁷ Kasner testified that she had frequently found Rouse sitting in the dark in his room with the students, doing nothing, and that she told Cooperman to be sure Rouse was in fact delivering instruction as reflected in his lesson plans (Tr. 595). She acknowledged telling Cooperman that Rouse believed he knows what is best for the school (Tr. 596).

⁸ Kasner testified that she told Cooperman that Dawes perceived Piccigallo to be one of the strongest teachers in the school, and that his students had relatively high test scores. However, Kasner said she herself had some concerns about his manner when he spoke with the children and “we needed to work with him” on that, though he was “quite a strong teacher” (Tr. 596-77).

Kasner told Cooperman to create a hostile work environment for the Union representatives.

During Cooperman's second week at the school, Kasner called her into her office and spoke with her alone. Kasner told Cooperman, "I want you to make it difficult for James and Chris to stay here" (ALJD p. 4, Tr. 178, 229). Cooperman asked Kasner whether she was being asked to create a hostile work environment, and Kasner said, "yes" (ALJD p. 4, Tr. 178, 229-30). Cooperman told Kasner that she could not do that (ALJD p. 4, Tr. 178). She said that going after the Union leadership would not sit right with the teaching staff, with whom she had to build relationships (Tr. 179). She told Kasner that she could evaluate Rouse and Piccigallo's performance on the job and that Kasner could use any negative evaluation as she saw fit (Tr. 179). Kasner told Cooperman that as a member of the leadership team she had to take direction from the team's head, Kasner, and to refuse would show that she was not a team player (ALJD p. 4, Tr. 179). Cooperman said she thought she was a team player, and was working and thinking very hard about how to elevate the instruction at the school and respond to the State report (Tr. 179-80).

During this conversation, Kasner gave Cooperman a copy of the Union contract and told her she would, "have to be dealing with these people. You might as well be informed." (Tr.180). Kasner said she, "could see it happening all over again," which Cooperman took as a reference to administrators being soft on teachers (ALJD p. 4, Tr. 181).

Kasner criticized Cooperman's cooperative approach toward Rouse and Piccigallo.

During her first two weeks at the school, Cooperman observed a class taught by Piccigallo as part of a "Junior Great Books" program (Tr. 181). Cooperman told Piccigallo afterwards that she had some concerns about the way he implemented the lesson and what the program was trying to achieve (Tr. 183, 434-35, 463). Piccigallo did not feel personally attacked

by Cooperman, but he told Rouse her criticism of his teaching had bothered him, and Rouse offered to speak to Cooperman on his behalf (Tr. 291, 333-34, 435, 463, 465). Rouse visited Cooperman in her office a day or two later and told her Piccigallo had been hurt by her criticism (Tr. 183, 232, 292). Cooperman told him she hadn't meant to make Piccigallo feel bad and would talk to him again (Tr. 183, 232, 292). During this conversation, Rouse and Cooperman discussed (Tr. 183, 293) talked a bit about Rouse's experience teaching, and then Cooperman asked him to create a glee club for the school (Tr. 184, 293). Rouse said he would try (Tr. 184, 293).

The next day, Kasner asked Cooperman why Rouse had been in Cooperman's office, and Cooperman. Kasner told Cooperman she had the right to evaluate Piccigallo however she saw fit. When Cooperman told Kasner she planned to speak with Piccigallo again, Kasner asked Cooperman whether she was a "people pleaser" (Tr. 184). Kasner told Cooperman that Rouse had been trying to manipulate and manage her, and that she was allowing him to be an administrator over her by discussing the Eisenhower Program (Tr. 184-85). Kasner told Cooperman to be very careful not to let that happen, and that Rouse could not be trusted (Tr. 184-85).

Cooperman proposed departmentalization of classes for middle and upper-level students to bring the school into compliance with State mandates.

During her first two weeks at the school, Cooperman observed students and consulted with teachers and social workers about their impressions of the school, including what was good and what needed changing (Tr. 198-99, 439-40, 413). She discovered that the school's teachers lacked licenses to teach particular subjects, and that many were inexperienced (Tr. 47, 212). Lesson plans she reviewed were inadequate to ensure the students were being properly educated (Tr. 213).

New York State licenses teachers of grades 6 and higher for particular subject areas, while elementary school teachers are licensed to teach all subject areas for all elementary grades (Tr. 212). Thus, the State standards recognize that elementary-level students can appropriately be taught by any teacher with skills appropriate to the student's young age, those in grade 6 and above are expected to be taught by teachers with specialty licenses in a given subject (Tr. 212, 256-57). As described above, the school's deficiencies in teaching to state standards for middle- and upper-level students at the school were particularly cited in the State Report (G.C. Ex. 4, pp. 13, 16 landscape, 2 portrait).

Cooperman felt that given the lack of specialty licensing among the school's middle- and upper-grade-level teachers, the best way to remedy the non-compliance with teaching to State standards as noted by the Report was to have teachers of the mid-level and older students choose a single subject area in which they felt most confident. The teacher could then prepare to teach a single subject, with her assistance, rather than continue to attempt to teach all subjects (Tr. 213-14). She felt this "departmentalizing" of teachers to make them specialists in particular subjects would make their responsibilities more manageable and allow her to more effectively train them (Tr. 214). She likewise felt departmentalization would enhance the education of the students in grades 6 and above (ALJD p. 4, Tr. 198-99, 204, 206, 214).

Cooperman tried several times to speak with Kasner about departmentalization during her first week, but Kasner repeatedly put her off, citing other pressing matters (Tr. 205). Cooperman did discuss departmentalization with Dawes, who expressed reservations about potential disruption caused by students changing classrooms (ALJD p. 4, Tr. 413-15). During Cooperman's second week, Kasner said that Dawes had told her about Cooperman's idea, and expressed some concerns. Kasner then asked Cooperman to describe her ideas, and Cooperman

did so (Tr. 198, 204, 206, 49-51, 413). She told Kasner that departmentalization would be best for the students and allow her the best framework for supervising and assisting teachers. She explained that she would have a better chance of developing each teacher's talents if they could each be focused on a single subject (Tr. 205, 47).⁹ Cooperman told Kasner that this should occur as soon as possible, in September, because of the number of new, inexperienced and unlicensed teachers scheduled to begin working at the school in the fall (Tr. 204). Kasner told Cooperman that she was concerned about transition time for students moving between classrooms (Tr. 45, 119, 197). Nevertheless, Kasner told Cooperman she was open to the idea, and asked Cooperman to write up the departmentalization plan for presentation to the Board of Trustees (Tr. 198, 206, 45).

At a Leadership Team meeting on July, 28, Respondent insisted that Rouse and Piccigallo had to be discharged.

On Friday, July 28, 2006, Cooperman attended her first leadership team meeting, along with Kasner, Osman, and Pierre (Tr. 185). No agenda had been announced; Kasner asked the group whether there was anything they wanted to talk about (Tr. 185-86). Cooperman said that she wanted to talk about distribution of students' Individualized Education Programs (IEPs) to the teaching staff.¹⁰ She said that Piccigallo had asked her earlier in the week about getting IEPs for new students and asked generally how IEPs would get to the teachers, noting that the State had expressed a specific concern about IEP distribution (Tr. 63-64, 71, 186, 438, G.C. Ex. 4, p. 2 portrait).¹¹ As soon as Cooperman mentioned Piccigallo, Osman got red in the face and called

⁹ Kasner testified that Cooperman told her she could "only" supervise teachers if they were departmentalized (Tr. 47, 120).

¹⁰ All students at the school have IEPs, which contain short- and long-term goals with respect to education, speech therapy, and other needs of the student (Tr. 219).

¹¹ Piccigallo testified that he asked Cooperman to get a copy of an IEP for a student who was visiting his classroom but had not been officially placed yet (Tr. 438). He was particularly concerned about getting the IEP because he was aware the State Report had found the school not in compliance with the requirements that teachers have copies

him a “fucking ...,” without finishing the expression (Tr. 186). He rose from his chair and said, “if he were in front of me, I’d punch him out...What does he want me to do, copy all the IEPs for him?” (ALJD p. 5, Tr. 186-87). Cooperman said that the secretary could copy the IEPs and asked Osman why he was so angry (Tr. 68, 187).¹² Kasner said that earlier in the week the Union representatives had walked out in protest over management having a recorder at a meeting about the janitor’s grievance (ALJD p. 5, Tr. 187). She said that she and Osman also thought Piccigallo had been insubordinate earlier in the week because he refused to take a new student into his classroom when Osman introduced him as a visitor (ALJD p. 5, Tr. 187-89). Cooperman said that in the future they should bring a visiting child to her so that as the teachers’ direct supervisor she could make a placement for the child, and that if Piccigallo refused her directive to take in a student she would write him up (Tr. 189-90). At that point Osman and Kasner said that the Union leadership was a problem at the school. Cooperman told them that she was uncomfortable being asked to “go after” the Union leaders in her position as the sole licensed administrator (ALJD p. 5, Tr. 190). Cooperman said that the teachers had to like her, and then corrected herself to say that they had to trust her (Tr. 190). Pierre said, “no, they have to like you, but you still don’t understand. Chris and James have caused a lot of problems at the school, and they really have to go.” (ALJD p. 5, Tr. 190). Osman echoed Pierre, saying they were, “trouble for the school” and “had to go” (Tr. 192). Osman said that he didn’t understand

of IEPs (Tr. 438, G.C. Ex. 4, p. 2 portrait). IEPs were kept in a binder in a sometimes-locked cabinet in the main office, along with other related papers (Tr. 219, 221, 466-67, 501). At the time Piccigallo asked Cooperman for the IEP, he knew how to find and review IEPs, but not that he could make and retain a copy for himself (Tr. 467).

¹² Osman described a conversation with Cooperman about Piccigallo’s IEP request outside of the context of a Leadership Team meeting. He recalled telling Cooperman that Piccigallo’s claim of inability to access IEPs meant he didn’t know anything about his students and was therefore incompetent. (Tr. 502-03). On cross-examination, Osman acknowledged that he told Cooperman that a teacher who did not know how to get IEPs was either incompetent or had a secondary agenda (Tr. 548). He initially refused to directly answer what he meant by “secondary agenda,” denying that it had anything to do with the Union (Tr. 549). After much interrogation about the matter, Osman testified that he believed that by asking Cooperman for the IEP, Piccigallo was attempting to instigate conflict between Cooperman and Osman (Tr. 549-554). He did not specifically deny having threatened to hit Piccigallo.

Cooperman, because “the paycheck is God” and if Cooperman didn’t follow Kasner’s directives her job would be in jeopardy. He said he didn’t understand why Cooperman was resisting (Tr. 190).¹³

At the end of the meeting, Kasner announced that whole leadership team would attend any staff meetings held by Cooperman (Tr. 191). Cooperman asked whether she could then be present at Osman and Kasner’s meetings and Kasner said she could not (Tr. 191). Kasner then announced that the next leadership team meeting would be on Monday, July 31, and that “facilitator” Sandy Kahn, who consults with the Board of Trustees, would be present (ALJD p. 5, Tr. 191).

After the meeting, Cooperman followed Osman into his office and asked him why he was so angry, since he had only one week more experience at the school than she had herself (ALJD p. 5, Tr. 191-92, 194, 223). Osman told Cooperman that they were both being tested as new administrators and if Kasner said that Rouse and Piccigallo had to go, then they had to go (ALJD p. 5, Tr. 194). Cooperman asked Osman whether he knew about the State Report, and he said he did not (Tr. 194-95, 222). Cooperman told him that the State had condemned the educational program at the school and that the leadership team had to address the issues raised by the State to improve the educational environment (Tr. 195). She told him that if the team spent all their time arguing about Rouse and Piccigallo they would be detracting from the business of running the school (ALJD p. 5, Tr. 195, 222, 252). She noted that the broader issue that she raised about IEP

¹³ Kasner testified that she told Cooperman she would have “some questions” about Piccigallo asking how to get an IEP (Tr. 65). Though initially reluctant to admit it, Kasner acknowledged that in her affidavit she stated that she told Cooperman to “consider the motives” of Piccigallo in asking for the IEP (Tr. 66). Kasner testified that she “was trying to ... encourage Mrs. Cooperman to think a little deeper.” (Tr. 66). She said that Piccigallo was presenting himself as without knowledge of how the school operated (Tr. 67). When pressed during her 611(c) testimony, she acknowledged that she told Cooperman not to take Piccigallo “at face value” and that she found it “odd” that Piccigallo asked about the IEP and told Cooperman to consider this oddness in her capacity as his supervisor (Tr. 68). While Kasner acknowledged that a secretary could copy the IEP, she insisted that Cooperman “think about what was going on with Mr. Piccigallo” in her capacity as his supervisor (Tr. 68-69).

availability had been lost in the argument about Piccigallo (Tr. 195). She told Osman that Kasner was not licensed as a school administrator and was limited by the State to spending 25% of her time on administrative functions (ALJD p. 5, Tr. 195, 222, 252).

On July 31, 2006, Kasner rejected Cooperman's departmentalization plan.

On the morning of the following Monday, July 31, Cooperman asked Piccigallo what had happened with respect to the matters that had been raised at the leadership meeting (Tr. 196, 436, 439). With respect to the grievance meeting, Piccigallo explained that while he and Rouse didn't mind the concept of a recorder, management had chosen the Assistant Dean to be the recorder, and they did not trust her to take unbiased minutes (Tr. 196). With respect to the visiting child, Piccigallo said that on the day in question he was going to take his class swimming, and the child did not have a permission slip for that activity (Tr. 196).¹⁴ Piccigallo expressed surprise that anyone had raised this as a problem, because Osman had not made an issue of it at the time (Tr. 196-97, 436).

While Cooperman was speaking with Piccigallo, Kasner called Cooperman and Osman into her office, and asked Cooperman whether she had told Osman that Kasner was incompetent (ALJD p. 5, Tr. 197, 252-53).¹⁵ Cooperman was stunned by the accusation and denied it (ALJD p. 5, Tr. 71-72, 197, 251-53). She said that she had told Osman that Kasner was not certified and that her time spent on administrative duties was specifically limited in the State Report (ALJD p. 5, Tr. 197, 252-53). Kasner said she knew Cooperman would say that, and then asked Osman to

¹⁴ Piccigallo described the incident somewhat differently, recalling that the student in question was not being allowed to join the class going swimming because he had been misbehaving (Tr. 435-36).

¹⁵ Kasner testified that Osman told her Cooperman said Kasner should not be in her position and would not take direction from Kasner (Tr. 70). Osman testified that Cooperman had told him that Kasner wasn't fit for her position and that he had reported to Kasner that Cooperman said she didn't "fit in her chair", but did not testify to saying that Cooperman refused to take direction from Kasner. (Tr. 505, 507, 538-39).

leave (Tr. 72, 197, 253).¹⁶ Kasner then told Cooperman, “you know those changes you wanted to make in the school?” Cooperman said yes, understanding that Kasner was referring to their discussion about departmentalization (ALJD p. 5, Tr. 197). Kasner then said, “You’re not making them.” (ALJD p. 5, Tr. 79, 197, 221, 251). Cooperman began suggesting ways the proposed changes could be modified. Specifically, with respect to Kasner’s concerns about time lost to students transitioning between classes, Cooperman said that the teachers could move between classes as students remained in one place (Tr. 198, 214). Kasner said that while Cooperman’s idea was interesting, she was, “not getting it. I’m not letting you do anything here next year,” and asked, “does that make you want to leave?” (ALJD p. 5, Tr. 198, 221, 251). Cooperman said it did not. She then left Kasner’s office (Tr. 198).¹⁷

Respondent discharged Linda Cooperman on August 1, 2006, after her second Leadership Team meeting.

The next day, August 1, Cooperman attended a second leadership team meeting, along with Kasner, Osman, Bradley, Pierre, and Sandy Kahn (ALJD p. 5, Tr. 199, 398). Kasner discussed re-instituting class reviews and solicited ideas about them (Tr. 199-200). During the meeting, Kasner went to the bathroom.¹⁸ Upon her return, Kasner said, “there is a member of the leadership team who is willing to take my input on the teachers on the staff, except for the two Union leaders.” (ALJD p. 5-6, Tr. 200). Cooperman told the group that she was being put in a difficult position because of her refusal to create a hostile work environment for Rouse and

¹⁶ Osman did not testify about this meeting.

¹⁷ In response to questions from Respondent’s counsel, Cooperman explained that she did not push back when Kasner said she could not make the changes because Kasner’s attitude toward her was very aggressive and Cooperman was fearful for her job, which she needed, financially (Tr. 250). She said that Kasner had a smile on her face when she asked Cooperman whether she wanted to leave, and that she “wasn’t about to push back at a person in that kind of frame of mind or mood” (Tr. 251).

¹⁸ Respondent’s witnesses testified that while Kasner was out of the room, Cooperman expressed frustration about Kasner’s refusal to implement her ideas for departmentalization (Tr. 400, 566-67).

Piccigallo. She said that she did not like being characterized as someone who could be manipulated or who was not a “team player” (ALJD p. 6, Tr. 201).

Kahn told Cooperman that she wasn’t, “getting it”. She said that it wasn’t only Kasner but Martha Bernard and the Board of Trustees who all wanted the Union leaders to go (Tr. 201). Kahn said that Rouse and Piccigallo had not only caused trouble for the school but a great deal of legal expense. She said the two had to go and that Cooperman’s refusal to assist with that goal was going to create a problem for Kasner (ALJD p. 6, Tr. 201). The meeting then ended (Tr. 201).

Shortly thereafter, Kasner called Cooperman into her office. When Kasner asked the bookkeeper to join them, Cooperman asked Kasner whether she was being fired. Kasner confirmed that she was, and allowed for no possibility of working matters out (ALJD p. 6, Tr. 202, 249, 615-16). Respondent failed to provide Cooperman with a reason for her discharge.

On the following day, Kasner sent a memo to the school staff announcing Cooperman’s departure, again providing no reason (G.C. Ex. 6). Cooperman sent an email to Trustee Howard Johnson in which she related Kasner’s hostility toward “certain members of the teaching staff” and Kasner’s directive that Cooperman create a hostile work environment for these teachers for reasons unrelated to their competence in their jobs (ALJD p. 6, Tr. 202-03, G.C. Ex. 8). Cooperman explained to Johnson that her resistance to this directive from Kasner resulted in her discharge (ALJD p. 6, Tr. 202-03, G.C. Ex. 8).

A School Custodian overheard Kasner and Bernard admitting that Cooperman had been fired for not discharging Piccigallo and Rouse. ¹⁹

Edwin Blowe, who worked as the head of maintenance at the school in the summer of 2006, was working in the front office a few days after Cooperman was fired and overheard a conversation between Bernard and Kasner (ALJD p. 6, Tr. 652, 655). Kasner told Bernard that Cooperman didn't want to follow her rules. (ALJD p. 6, Tr. 654, 682) Kasner said that she wanted to get rid of her headaches, and identified her headaches as Rouse and Piccigallo (ALJD p. 7, Tr. 654, 682). While Kasner and Bernard also talked about changes that Cooperman wanted to make at the school which could not be rushed, Blowe testified that, as he heard the discussion, "the big issue was because they wanted to get rid of Piccigallo and Mr. Rouse" (Tr. 652, 658, 681-82). In the same conversation Bernard and Kasner, "were saying they didn't want no union" and wanted to get the Union out of the school (Tr. 659-60). He specifically recalled Bernard saying, "it would be better if the building wouldn't have a union in it because we don't need a union" (Tr. 660).

Respondent continued to display of hostility toward the Union and its representatives after firing Cooperman.

Osman threw a contract at the Union delegate during a grievance meeting.

In September, 2006, the Union filed two grievances. One concerned a directive Osman issued to the social work staff to call his cell phone when they were going to be absent, and the other concerned Respondent's refusal to give the Union and members job descriptions for that school year (ALJD p. 7, Tr. 295, 447, 469-470, 536). Immediately after the Union filed these grievances, to the surprise of the Union representatives, xeroxed copies appeared in staff

¹⁹ Although the ALJ did not specifically rely on all of Blowe's testimony, General Counsel feels it is important to present Blowe's more detailed testimony.

members' mailboxes (Tr. 296, 370, 447, 472). It is not the Union's practice to distribute copies of grievances to the staff, and the Union representatives had not distributed these (Tr. 296, 473).

On September 26, 2006, a grievance meeting was held in Kasner's office over the grievance involving Osman's directive that social work staff call his cell phone (Tr. 296, 344, G.C. Ex. 14). In attendance were Kasner, Osman, Rouse, and Piccigallo (Tr. 296-97). Osman complained in the course of the meeting that he was not obliged to deal with Piccigallo and Rouse, accusing Piccigallo of only representing himself (Tr. 297, 451-52, G.C. Ex. 14, p. 8). The representatives explained that there were grievance procedures which had to be followed, and that bargaining should be conducted with the Union representatives and not with unit members directly when a representative is not present (ALJD p. 7, Tr. 297, G.C. Ex. 14, pp. 6-10).²⁰ Osman asked whether he was being accused of illegal behavior, and Rouse explained that Osman had violated the contract (ALJD p. 7, Tr. 298, 372-73, 450 G.C. Ex. 14). Osman became angry and hit his hand against the table, repeatedly accusing Rouse of saying he had done something illegal (Tr. 298, 372-73, 450, 552, G.C. Ex. 14). He loudly demanded that Rouse show him the relevant contract provision. He then picked up a copy of the contract and shook it, repeating, "show me, show me" (ALJD p. 7, Tr. 299, G.C. Ex. 14). He then flung the contract at Rouse from about seven feet away, hitting him in the stomach and producing an audible thud in the recording (ALJD p. 7, Tr. 299, 450-51, G.C. Ex. 14).²¹ Piccigallo said there was a problem, Kasner agreed, and the Union representatives left the room (Tr. 299-300, 451, G.C. Ex. 14).²² Kasner issued a memo regretting the breakdown of the meeting (G.C. Ex. 5, Tr. 76-77, 614).

²⁰ Osman had talked directly to the social workers about the grievance regarding his cell phone directive (Tr. 371, 520, 537-38).

²¹ Osman and Kasner did not deny that the contract was thrown but testified that Osman had only tossed the contract gently and that it slid over the edge of the table into Rouse's lap (Tr. 552, 613-14).

²² Kasner agreed that Osman's behavior was "problematic" at the meeting; that he had lost his temper and that she was unhappy with his behavior (Tr. 74). Kasner testified that Osman was "verbally corrected" by herself and "other members of the school's team," but acknowledged he was not issued any written discipline (Tr. 77-78).

The representatives reported the incident to the police and to Trustee Howard Johnson (Tr. 302-03, 452, G.C. Ex. 12).

Kasner threatened to discharge a temporary employee and increase Rouse and Piccigallo's duties if they pursued a grievance on behalf of the employee.

On March 6, 2007²³, Rouse and Piccigallo met with Kasner about a grievance seeking health insurance for a substitute teacher (ALJD p. 7, G.C. Ex. 7, p. 2). Kasner told Rouse & Piccigallo that temporary employees, including the teacher in question, are not covered by the Union contract. Kasner replied, "You know what? You know what I'm going to do? You guys want to push this? I won't have any temporary teachers, and you guys can figure out how you're going to cover the classes." She then said she would fire the teacher at issue and repeated that Rouse and Piccigallo could figure out how to cover classes (ALJD p. 8, Tr. 634, G.C. Ex. 7, p. 3). Piccigallo tried to continue the conversation, but Kasner insisted she could fire the temporary teachers and refused to discuss the matter further. She then changed the subject to janitorial hours, saying that she wanted to keep the school cleaner. She told Rouse and Piccigallo, "You guys are getting in the way of my doing things to improve the running of the school, and I resent it, and I'm sick of it." (ALJD p. 8, G.C. Ex. 7, p. 4). Rouse said she was being unfair and Kasner said she didn't want to hear from him, though she acknowledged that she had asked Piccigallo to come into her office (G.C. Ex. 7, p. 5). Rouse tried to calm Kasner, who answered that she didn't want to calm down. She then suggested a date for another meeting (G.C. Ex. 7, p. 5).

²³ The ALJ's decision references this incident as occurring in May rather than March 2007.

Current Instructional Supervisor Barry Malloy told Rouse that unfair harassment against him will continue regardless of his job performance.

Although the ALJ didn't rely on the following information the General Counsel deems it important to note Rouse's testimony in regards to his conversations with Barry Malloy.²⁴ In late April, 2007, Respondent's current Instructional Supervisor, Barry Malloy, told Rouse that he should be careful about handing out Union cards to new members because he was being watched and his actions, "could be misunderstood" (ALJD p. 8, Tr. 306).²⁵ The two had several additional conversations in early May of 2007, in which Malloy admitted that Respondent has been unfairly harassing Rouse (ALJD p. 8-9, Tr. 306-07, 336).

The conversations between Malloy and Rouse were prompted by Osman asking Malloy to investigate Rouse for an absence from the school building at a time he was scheduled to be teaching (Tr. 307-08, 315). Malloy asked Rouse about the matter in question, and Rouse told Malloy that he had been in his classroom (Tr. 308-9). Rouse then told Malloy he thought Respondent was harassing him and Piccigallo, since Osman had made prior false allegations against them (Tr. 309). Malloy agreed with Rouse, saying he saw Osman's behavior "very clearly" and that he saw it, "for sure as harassment." Malloy told Rouse he had tried to talk to Osman about the matter to no avail (Tr. 310). When Rouse asked for guidance, Malloy advised Rouse to stay in his classroom, but Rouse countered that he had to circulate in the building to perform his Union duties, which Malloy acknowledged (Tr. 311, 394). Malloy told Rouse to avoid Osman as much as he could, but said he believed that Kasner was behind the harassment and that it was deliberate and would continue (ALJD p. 9, Tr. 310-12). Malloy told Rouse that Kasner seemed more angry with Rouse lately, and suggested that she seemed to think he was

²⁴ Moreover an adverse inference should be drawn based on Malloy's failure to testify about these conversations with Rouse. *International Automated Machines*, 285 NLRB 1122 (1987).

²⁵ Barry Malloy has been Respondent's Instructional Supervisor since September 7, 2006 (Tr. 689).

against “against her because of the pending NLRB case.” (Tr. 311). Malloy told Rouse that if Kasner thought he would be resigning from the School she might have “a change of heart about the harassment” (ALJD p. 9, Tr. 312). Malloy told Rouse that he disagreed with Osman and Kasner and had told them several times that Rouse had the right to engage in Union activities, and that they had responded to him that no Union activity was to be conducted during school time, “period” (Tr. 312).

During this conversation, Malloy read Rouse parts of a letter he said he had written to Osman which stated that several staff members had confirmed that Rouse had not been outside the building during class time as Osman had alleged, and that he felt the mistreatment of Rouse was “wrong” (Tr. 313). Shortly thereafter, Malloy told Rouse that Osman had revised his accusation and was claiming that Rouse was allegedly outside earlier than first claimed. The new time cited was during Rouse’s prep period (Tr. 314-15). Rouse told Malloy that although he was allowed to be outside during his prep period he did not feel comfortable answering Malloy about the specific time in question without a Union representative present (Tr. 315, 345).²⁶ Malloy told Rouse that he had told Osman the whole issue was ridiculous (Tr. 315).

During this conversation, Malloy again told Rouse that he disagreed with Respondent’s treatment of Rouse (Tr. 316). He said that Kasner and Osman would view him as being “in collusion” with Rouse if he were to take Rouse’s side, even if he were simply stating the truth (Tr. 316). Malloy did not testify about any of his conversations with Rouse. At the time of the trial, a grievance was pending against Respondent for its harassment of Rouse and Piccigallo (Tr. 144).

²⁶ During cross-examination, Rouse testified that he did have a cigarette outside the building during the second period on the day in question, which is his prep period (Tr. 342-43). Respondent has no rules against smoking outside the school during a break in the school day, and Rouse meets other teachers on these smoking breaks (Tr. 343, 390, 394).

IV. ARGUMENT

A. Respondent's credibility arguments should be dismissed.

In his brief Respondent excepts to the ALJ's credibility determinations in regard to Cooperman, arguing that Cooperman was contradicted by Respondent's witnesses and documentary evidence and thus that the ALJ misinterpreted the record in making his credibility determinations. General Counsel notes that the Board's established policy is not to override an ALJ's credibility resolutions unless the clear preponderance of all the relevant evidence demonstrates them to be wrong. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf'd 188 F.2d 362 (3rd Cir. 1951). Aside from the arguments highlighted in General Counsel's Cross Exceptions, there is no basis for reversal in this case.

The ALJ credited Cooperman based on her demeanor on the witness stand (ALJD p. 4). Demeanor findings are virtually unassailable. *Id* at 545. Further, as evidenced by the transcripts, Cooperman's testimony was consistent and clear. Where there were witnesses to events who were not aligned with Respondent's interests, she was corroborated.

By contrast, as evidenced by the transcripts, Respondent's witnesses were at times internally inconsistent and failed to corroborate other Respondent witness testimony on important points. For instance Kasner testified to a litany of complaints by Dawes about Cooperman's manner, claiming that Dawes told her she found Cooperman hostile, critical, argumentative, and unreceptive to feedback, and that Dawes was also critical of

Cooperman's manner with students (Tr. 38, 598). Dawes's own testimony about Cooperman was significantly more measured. Dawes recalled telling Kasner that she found Cooperman's negative reaction to the Junior Great Books program insulting to her own judgment and that Cooperman was a "know-it-all" (Tr. 416-19). Even when asked leading questions by Respondent counsel, though, Dawes did not recall ever describing Cooperman as rude or condescending, and she did not testify to having any concerns about Cooperman's interaction with students (Tr. 419-20).

Kasner also testified that Bradley had told her that Cooperman was unreceptive to his concerns about transition time, and that she had told Cooperman that Bradley had complained that Cooperman had an abrasive manner (Tr. 600-02). Kasner testified that Bradley later reported to her that Cooperman had confronted him about the matter (Tr. 602-03). But, Bradley did not corroborate Kasner's claim that he found Cooperman abrasive, let alone that he ever said anything to Kasner about such a problem, and he did not testify about Cooperman ever confronting him about anything. The only testimony Bradley offered about Cooperman's personality was that he noticed, but did not speak to anyone about, "tension" during a leadership team meeting between Kasner and Cooperman (Tr. 571). Kasner testified additionally that a teacher described Cooperman as "very harsh," that Pierre expressed concern that Cooperman was not receptive to input, and that the school's bookkeeper "was not fond of" Cooperman (Tr. 599-601). The witnesses who did testify failed to corroborate Kasner's account of their assessments of Cooperman. Finally General Counsel notes that adverse inferences can be drawn from Respondent's failure to call Pierre, Bradley's lack of testimony regarding matters Kasner reported him witnessing, and Malloy's failure to testify about his conversations with Rouse. *Pioneer Hotel, Inc.*, 324 NLRB 918, 928 (1997).

As evidenced above, the record clearly establishes that the ALJ was correct in the credibility determinations that Respondent excepts to. Respondent has failed to meet his burden in showing that those credibility findings were incorrect. Thus in accordance with the Board's longstanding policy, the ALJ's credibility determinations should not be overridden. *Standard Dry Wall, supra*.

B. The ALJ applied the appropriate legal standard to Cooperman's discharge

Respondent objects to the ALJ's use of a non-*Wright Line* standard in making his determination. While the ALJ did not specifically spell out the *Wright Line* standard, he clearly applied the appropriate standard.

Although supervisors are not statutory employees entitled to the direct protection of the National Labor Relations Act, an employer's discharge of a supervisor will violate Section 8(a)(1) of the Act if it infringes on the employees' exercise of their Section 7 rights. *See, International Longshoremen Assoc. v. Davis*, 476 US 380, 384, n. 4 (1986). The Board has repeatedly held that the discharge of a supervisor for refusing to commit an unfair labor practice constitutes such an infringement, and as such violates Section 8(a)(1). *Professional Medical Transport, Inc.*, 346 NLRB No. 108 (2006), *Pioneer Hotel, Inc.*, 324 NLRB 918 (1997), *Parker-Robb Chevrolet, Inc.*, 262 NLRB 402, 404 (1982), *enf'd sub nom., Automobile Salesmen's Union Local 1095 v. NLRB*, 711 F.2d 383 (D.C. Cir. 1983).

The Board has found supervisor discharges unlawful even where the supervisor has refused to take unlawful adverse actions against employees short of discharge. *See, i.e., Trus Joist MacMillan*, 341 NLRB 369 (2004) (supervisor unlawfully discharged for refusing to give negative evaluation to union supporter); *USF Red Star, Inc.*, 330 NLRB 53 (1999) (unlawful

discharge of supervisor for not reporting an employee's accident where the report would have been used as pretext for unlawful discharge of employee).

In evaluating an alleged unlawful discharge of a supervisor, the Board applies a modified version of the analysis set forth in *Wright Line*, 251 NLRB 1083, 1089 (1980), *enf'd.*, 662 F.2d 899 (1st Cir. 1981). Thus, in order to establish that a supervisor's discharge is unlawful,

the General Counsel must first establish by a preponderance of the evidence that the supervisor engaged in protected activity, Respondent was aware the supervisor engaged in such activity, an adverse employment action was taken against the supervisor, and a motivational nexus exists between the supervisor's protected activity and the adverse employment action. ... The burden then shifts to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct. *Professional Medical Transport, Inc.*, 346 NLRB No. 108 (2006), slip op. at 9, citing *American Gardens Management Co.*, 338 NLRB 644, 645 (2002).

Both employer knowledge of protected activity and anti-union motivation in taking adverse action may be proven by circumstantial, as well as direct, evidence. *See, e.g., Dlubak*, 307 NLRB 1138, 1155 (1992), *enf'd.*, 5 F.3d 1488 (3rd Cir. 1993); *Abbey's Transportation Services*, 284 NLRB 698, 700, 701 (1987), *enf'd.*, 837 F.2d 575 (2nd Cir. 1988). The employer's adverse action is evaluated in the context of all the surrounding circumstances. *See, American Cyanamid Co.*, 301 NLRB 253 (1991); *Abbey's Transportation Services*, *supra*, at 700.

Even where the employer's rationale is not patently contrived, the Board has held that the "weakness of an employer's reasons for adverse personnel action can be a factor raising a suspicion of unlawful motivation." *General Films*, 307 NLRB 465, 468 (1992). Here, analysis of all the circumstances leads to the inescapable conclusion that Respondent violated Section 8(a)(1) of the Act by discharging Cooperman.

Cooperman's credited testimony establishes that Respondent repeatedly told her to create a hostile working environment for the two Union representatives at the school. Her testimony is

in accord with the evidence reviewed above showing Respondent's active unfair hostility toward Rouse and Piccigallo because of their Union activities, both before and after Cooperman's tenure.

From her earliest conversations with Cooperman, Kasner made clear that she was angry at Rouse and Piccigallo because of her perception that they were trying to usurp her administrative authority in their roles as Union representatives (Tr. 174-75, 177). In Cooperman's second week, Kasner explicitly told her to, "make it difficult" for the Union representatives to stay at the school, and confirmed that she wanted Cooperman to create a hostile work environment for them (Tr. 178, 229-30). Kasner discouraged her from trying to establish smooth working relationships with the representatives, accusing her of being a "people pleaser" when Cooperman said she planned to speak with Piccigallo about his apparent hurt feelings, and told her not to trust Rouse or cooperate with his seeking information about the Eisenhower program (Tr. 184-85).

When Cooperman failed to heed Respondent's directives immediately, Osman and Pierre, in Kasner's approving presence, told Cooperman in the July 28, 2006, leadership team meeting that the representatives were trouble for the school and "had to go" (Tr. 192). Osman pointedly told Cooperman that her job rested on her following Kasner's orders (Tr. 190). Cooperman reiterated that she was uncomfortable with being asked to go after the Union representatives (Tr. 190).

In a retaliatory effort to force Cooperman's resignation, Kasner denied Cooperman's authority to hold staff meetings without the attendance of the entire leadership team and then withdrew her prior commitment to consider Cooperman's departmentalization plan. The sudden opposition to the plan clearly was unrelated to any concerns about its merits. Kasner's one stated

substantive objection, that student transition between classrooms would be too disruptive, would not have been an issue under Cooperman's modified suggestion that teachers do the moving instead (Tr. 191, 198, 214). Kasner, though, refused to reconsider her opposition, telling Cooperman she wasn't "getting it," clearly indicating her rejection was unrelated to the departmentalization idea itself. She pointedly asked Cooperman if that made her want to leave (Tr. 198).

Respondent made one final effort to push Cooperman to make life miserable for Rouse and Piccigallo on the following day at another leadership team meeting. Kahn told Cooperman that the entire Board of Trustees wanted the Union leaders out of the school and that Cooperman's refusal to act in accord with that wish was a problem for Kasner (Tr. 201). Cooperman was steadfast in her refusal to unlawfully create a hostile work environment for the representatives. Blowe's credited testimony recalled Kasner and Bernard agreeing after Cooperman's discharge that she had to be fired because of her refusal to dismiss Kasner's "headaches" Rouse and Piccigallo. Her discharge for this refusal is in clear violation of the Act.

The weakness of Respondent's defense suggests that Cooperman's discharge was for illegitimate reasons. Kasner herself acknowledged that it can take as long as a month for someone to get comfortable working in a new environment, a period Cooperman was not granted (Tr. 89). Cooperman recalled that on the one occasion she spoke with Kasner about getting along with people, when Rouse had told her of Piccigallo's hurt feelings, Kasner accused her of being a "people pleaser". Kasner was inconsistent about whether she had even ever spoken to Cooperman about any perceived abrasiveness, claiming at trial that she had, and that Cooperman promised to work on it, but admitting that she mentioned no such conversation in her affidavit

(Tr. 86-89, 602, 620).²⁷ Respondent's failure to raise a problem with the discriminatee which it later claims as a motivation for her discharge, and failure to allow the discriminatee the opportunity to explain alleged problematic behavior, may be a significant factor weighing toward finding discriminatory motivation.

Respondent's shifting defenses and distortion and exaggeration of Cooperman's deficiencies are further evidence that Cooperman was discharged for unlawful reasons. In addition to the insubordination and abrasiveness complaints, Kasner peppered her testimony with almost random criticisms of Cooperman, without claiming any of them to have precipitated Cooperman's discharge.²⁸ Respondent's grab-bag approach to its defense belies its pretextual nature. An employer's distortion and exaggeration of a supervisor's deficiencies in defending an unlawful discharge undermines its claims the discharge was motivated by mere business judgment. *Pioneer Hotel*, 324 NLRB at 930, fn. 20 (citing *Postal Service*, 256 NLRB 736, 738 (1981)). Moreover Respondent's shifting reasons offered in defense give rise to the inference

²⁷ The only mention of any conversation about staff's perception of Cooperman in Kasner's affidavit is of a conversation *initiated by Cooperman* after Rouse approached her about her discussion with Piccigallo. Kasner recounted in her affidavit that Cooperman said her "tone" needed work, and Kasner responded that could be true because others found her abrasive. The conversation as recounted in Kasner's affidavit is in the nature of a subordinate seeking feedback from a superior about a self-assessed challenge. (R. Ex. 2, ¶20, p. 11).

²⁸ These included that during Cooperman's three weeks on the job, Kasner became aware that Cooperman lacked experience with students with mental health issues, despite the evidence that the two had discussed Cooperman's experience during her interview, and despite the lack of evidence that Cooperman ever mis-handled any interaction with students (Tr. 599). Kasner complained that Cooperman did not get to know students, but acknowledged that she had mentioned no such problem in her affidavit to the Labor Board. She insisted that she spoke to Cooperman about the problem (who said she would work on it) but could not place the conversation with any specificity in time (Tr. 54-56, 85-86). Likewise, Kasner seemed perturbed at Cooperman for spending time cleaning out the Instructional Supervisor's office after Dawes left, but acknowledged that she had told Cooperman it would be fine for her family members to come to the school to assist her in those efforts, hardly a demonstration that the clean-up was a dischargeable offense (Tr. 54-55, 62).

that the real reason for Cooperman's discharge was not any of those suggested by the employer's witnesses. *Pioneer Hotel supra*, at 929.

Respondent's Union animus and the timing of Cooperman's discharge upon her repeated refusal to discharge Rouse and Piccigallo provide the nexus between her refusal to commit unfair labor practices and her discharge. The evidence discussed above in support of General Counsel's initial showing of unlawful conduct serves equally to discredit the employer's claim that it would have taken the same action absent the protected activity. *See, e.g., Detroit Newspaper Agency v. NLRB*, 435 F.3d 302 (D.C. Cir. 2006), at 311. Thus, in *Wright Line*, the Board first relied, in part, on evidence of disparate treatment to find that the General Counsel had satisfied his burden of proving that protected activity was a motivating factor for the employer's adverse action. *See* 251 NLRB at 1090. It then relied on that same evidence to hold that the employer had not established that it would have taken the same adverse action absent the employee's protected activity. *Id.* at 1091. All of the foregoing factors establish that Cooperman's refusal to take adverse employment actions against Rouse and Piccigallo motivated Respondent to discharge her. To effectively rebut this showing, Respondent needs not only to present a legitimate reason for its actions but must "persuade by a preponderance of the evidence that the same action would have taken place even in the absence of the protected conduct." *Pioneer Hotel*, 324 NLRB at 929, citing *Centre Property Management*, 277 NLRB 1376 (1985); *See also, Casa San Miguel, Inc.*, 320 NLRB 534, 547 (1995). Respondent did not meet this burden of persuasion.

Although the ALJ did not set forth and apply the above described standard and application in a structured manner, he essentially applied the correct standard and came to the appropriate conclusion. The ALJD found the following:

In the present case, I conclude that the General Counsel has made out a strong case that the Respondent discharged Cooperman because she would not assist Kasner in forcing the resignations of the two union delegates because of their union positions and because of their role in enforcing the terms of the collective bargaining agreement. In that regard, Cooperman was clearly being asked to commit an unfair labor practice under Section 8(a)(1) and (3) of the Act. Further, having considered all the evidence, I conclude that the Respondent has not shown that it would have discharged Cooperman for reasons other than her refusal to commit an unfair labor practice. I therefore find that the Respondent's discharge of Cooperman violated Section 8(a)(1) of the Act. (ALJD p. 11).

In the above passage the ALJ effectively applied a dual motive standard and found that the General Counsel had made a prima facie showing of a violation under the Act and that Respondent failed to meet its burden under *Wright Line*. The ALJ found substantial evidence of Union animus and nexus relying primarily on: evidence that Kasner believed the Union stood in the way of allowing her to operate the School in an efficient manner; Kasner's statements that the previous administration had been soft on teachers, had allowed them to control the school, had made decisions with a view to avoiding grievances, and that Kasner was going to show them who's boss; Kasner's initial refusal to provide the Union with the names and addresses of new hires; Cooperman's credited testimony that she was specifically told that "Chris and James have caused a lot of problems at the school, and they really have to go;" and the credited testimony of Kasner's statement overheard by Blowe that Kasner wanted to get rid of her headaches and that her headaches were Rouse and Piccigallo. (ALJD p. 10). Further in determining whether Respondent met its burden of persuasion under *Wright Line* the ALJ balanced Respondent's various alleged factors which caused Cooperman's termination and found that based on the evidence "The proximate and predominant reason for Kasner's decision to discharge Cooperman was the latter's unwillingness to make life difficult for and force the resignations of the two Union delegates Rouse and Piccigallo." (ALJD p. 10). That is to say the ALJ effectively found Cooperman would not have been discharged by Respondent absent her protected activity.

C. The ALJ was correct in his admission of and reliance on audio recordings

Respondent excepts to the ALJ's receipt into evidence and reliance on Rouse's audio recordings during grievance meetings in September 2006 and May 2007. While recordings of this and a second grievance meeting were initially admitted into evidence during the trial (as G.C. Ex.s 7 and 14), there was post-admission colloquy regarding the appropriateness of their admission. While there was no dispute regarding the accuracy of these transcripts and indeed Respondent counsel objected to witness testimony on the grounds that the recordings were the best evidence (Tr. 450) he later argued that the exhibits should be excluded because they were surreptitious recordings of negotiation sessions which have been found inadmissible (Tr. 646).

In his decision the ALJ expressed some doubt regarding his admission of the audio recordings during the trial, based on *Triple A Fire Protection*, 415 NLRB 409, 411 (1994) which expressed the Board's policy of precluding secret recordings of contract negotiation sessions. For the following reasons, the ALJ's was correct in admitting and relying on the audio recordings.

First and foremost the audio recordings were of grievance meetings and *not contract negotiation sessions*. Further there is no indication in the *Triple A Fire, supra* decision that the Board intended the announced policy on audio recordings to extend to recordings of events outside the realm of contract negotiation sessions. In general Board precedent allows for the admission of surreptitious recordings into evidence, *Orange County Publications*, 334 NLRB 350 (2001) citing *East Belden Corp.*, 239 NLRB 776, 782 (1978), *enfd.* 634 F.2d 635 (9th Cir. 1980); *See also Wellstream Corp.*, 313 NLRB 699, 711 (1994); *cf. Waltz Masonry*, 323 NLRB 1258 (1997); and *Monroe Mfg.*, 323 NLRB 24 (1997), a rule to which *Triple A Fire, supra* represents a narrow exception.

Even accepting for argument's sake that grievance meetings may be analogized to negotiation sessions, the circumstances of the admission of the recordings in question distinguishes them from those found inadmissible in Board cases. In *Carpenter Sprinkler Corp.*, 238 NLRB 974 (1978) and *Triple A Fire Protection*, 315 NLRB 409 (1994), the Board considered recordings of contract negotiation sessions which were offered in evidence in cases involving violations of the employers' obligation to bargain under Section 8(a)(5). Such recordings were determined inadmissible because of their potential chilling effect on the free flow of ideas between parties during bargaining. The instant case does not involve bargaining allegations and the substance of the parties' discussions in those meetings is not in issue. The recordings were offered and admitted for the narrow purpose of providing corroborative evidence of animus against Rouse and Piccigallo. Thus, the Board's reasoning in the cited cases does not apply to these exhibits, which are more analogous to the evidence admitted by the Board in *East Belden Corp, supra*.

D. *The ALJ was correct in concluding that it was Rouse and Piccigallo's protected activity that prompted Kasner to solicit Cooperman to commit unfair labor practices against them*

Finally Respondent argues that even crediting Cooperman's testimony that Kasner asked her to make it difficult for Rouse and Piccigallo to stay in the School, the ALJ erred in concluding that it was Rouse and Piccigallo's protected activity that upset Kasner. In support of its argument, Respondent points to several pieces of testimony from the transcripts, all of which are hearsay, uncorroborated testimony, misconstructions of the evidence, or uncredited testimony. Accordingly Respondent's argument in its entirety should be disregarded.

The following are just a few examples of the unreliable evidence on which Respondent relies in making its argument. Respondent states that Rouse made certain

derogatory comments to Kasner, and slammed a door in Kasner's face. This testimony was previously and rightfully disregarded by the ALJ as it was provided solely by Kasner and was not corroborated by any other witnesses. Moreover this evidence becomes even more dubious in light of the fact that Rouse was never disciplined for this alleged inappropriate behavior. (Tr. 703).

Additionally Respondent states that Rouse harassed Diaz when Rouse informed Diaz of the urgent need to obtain proper certification. In making this contention, Respondent relies on Cooperman's hearsay testimony of an overheard phone conversation between Kasner and Diaz as well as Rouse's testimony of his legitimate efforts, under his duties as a Union delegate, to ensure that Diaz received the certification required by the School.

Overall Respondent's negative assessments of Rouse and Piccigallo are unsupported. Respondent's witnesses repeatedly acknowledged that the Union representatives' performance appraisals were uniformly positive over their years at the school (Tr. 90, 347, 426, 535). To the extent Respondent asserts performance-based complaints about Rouse and Piccigallo, the testimony is clearly contradictory. *Hospital San Pablo*, 327 NLRB 300 (1998), *enf'd*, 207 F.3d 67 (1st Cir. 2000) (proffered rationale for discharging employee suspect in light of positive performance evaluation); *Montgomery Ward & Co.*, 316 NLRB 1248, 1254-1255 (1995), *enf'd*, 97 F.3d 1448 (4th Cir. 1996) (employer reasons for discharge pretextual where discriminatee was "frequently praised" and supervisor "acknowledged" that his work performance was "satisfactory").

In light of the above, Respondent's attempts to paint the defense that Rouse and Piccigallo were unfavored because of their "unprotected" activity is unsubstantiated and without merit. The record and the relevant case law clearly demonstrate that Rouse and Piccigallo were targets of harassment due to their protected activities. This argument is yet another weak attempt by Respondent to distract the Board from Respondent's violation of the Act.

V. CONCLUSION AND REMEDY

General Counsel submits that on the basis of the entire record and the reasons above, a preponderance of the credible evidence clearly supports the Administrative Law Judge's decision and the allegations of the Complaint. It is respectfully urged that the Board dismiss Respondent's exceptions to the ALJ's decision and that the Board make a finding that Respondent violated Section 8(a)(1) of the Act as alleged and order traditional reinstatement, make-whole, and notice remedies.

Dated at New York, New York,
This 29th day of October, 2007.

Respectfully submitted,

A handwritten signature in cursive script, reading "Lindsay R. Parker", followed by a horizontal line.

Lindsay R. Parker
Counsel for the General Counsel

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
Region 2

THE LORGE SCHOOL
Respondent

and

LINDA COOPERMAN
Charging Party

Case 2-CA-37967

DATE OF MAILING 10/29/2007

**AFFIDAVIT OF SERVICE OF COUNSEL FOR THE GENERAL COUNSEL'S BRIEF IN ANSWER
TO RESPONDENT'S EXCEPTIONS**

I, the undersigned employee of the National Labor Relations Board, being duly sworn, depose and say that on the date indicated above I served the above-entitled document(s) by post-paid ~~certified~~ mail upon the following persons, addressed to them at the following addresses:

RW

via E-FILING and REGULAR MAIL

National Labor Relations Board
Office of the Executive Secretary
Attn: Lester A. Heltzer,
Executive Secretary
1099 14th Street, N.W.
Washington, DC 20570

United Federation of Teachers, Local 2,
American Federation of Teachers, AFL-CIO
Attn: Antonio M. Cavallaro
Associate Counsel
52 Broadway, 9th Floor
New York, NY 10004
Fax # (212) 228-9253

via FEDERAL EXPRESS (overnight)

Linda Cooperman
3 Patterson Road
Pound Ridge, NY 10576-1521

Daniel A. Silverman, Esq.
Silverman & Silverman LLP
52 Third Street
Brooklyn, NY 11231
Fax # (718) 855-2933

via REGULAR MAIL

The Lorge School
Attn: Martha D. Bernard,
Chair, Bd. of Trustees
353 West 17th Street
New York, NY 10011
Fax # (212) 989-8249

Subscribed and sworn to before me this 29th day
of October, 20 07

DESIGNATED AGENT

[Signature]

NATIONAL LABOR RELATIONS BOARD